UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of UMASS MEMORIAL MEDICAL CENTER Employer [1] and INTERNATIONAL ASSOCIATION OF EMTS AND PARAMEDICS, LOCAL 95, SEIU/NAGE Petitioner [2]	Case 1-RC-22044

DECISION AND DIRECTION OF ELECTION [3]

The Employer, which is located in Worcester, Massachusetts, is in the business of providing ambulance transportation services. The Petitioner currently represents a unit of the Employer's full-time and regular part-time EMT/Intermediates and EMT/Paramedics, [4] excluding all dispatchers, supervisory, managerial, temporary, per diem employees, and all other employees. In the present case, the Petitioner seeks an "*Armour-Globe*" [5] self-determination election, in which the Employer's per diem EMT/Intermediates and EMT/Paramedics would be permitted to vote whether or not they wish to be included in the existing unit currently represented by the Petitioner. The Employer takes the position that the petition should be dismissed because: (a) to permit such an election during the life of the parties' current collective-bargaining agreement [6] would disturb the parties' existing contractual relationship; (b) the Board should apply contract bar rules to petitions seeking *Armour-Globe* elections, since the

terms of any existing collective-bargaining agreement covering the unit involved do not automatically apply to the employees who vote for inclusion in the existing unit; (c) the Employer takes the position that even though a favorable result of a self-determination election in this case would be to place the per diem employees in the existing unit, the fact that the Employer would then have to bargain with the Petitioner over the terms and conditions of employment of the per diem employees amounts to a violation of the Congressional admonition against the proliferation of bargaining units in the health care industry; and (d) the current unit, as described in the parties' contract, specifically excludes per diem employees, which the Employer asserts amounts to a waiver by the Petitioner of its right to represent per diem employees as part of the existing unit for the life of that contract. The Employer further maintains that if an election is directed, the eligibility formula should require that per diem employees have worked an average of 8 hours (as opposed to 4 hours) per week during the appropriate eligibility period.

I conclude that Board law does not support dismissal of the current petition on any of the grounds asserted by the Employer. Accordingly, I will direct a self-determination election among the Employer's per diem EMT/Intermediates and EMT/Paramedics who have worked an average of 4 hours per week during the calendar quarter immediately preceding the date of this Decision. Finally, I conclude that the mechanics of the election, including whether the election should be conducted manually or by mail ballot, is an administrative matter to be determined by the Regional Director following the issuance of the Decision and Direction of Election.

A. **THE MOTION TO DISMISS**

1. Facts:

The Employer's per diem paramedics perform the same duties as the full-time and regular part-time paramedics who are included in the unit. According to Dennis McCarthy, the Employer's director of labor relations, who served as its chief spokesperson during the negotiations[7] that led to the parties' current collective-bargaining agreement, in a conversation during those negotiations, the Petitioner's chief spokesperson, William Dino, took the position that many of the Employer's per diems should not be in a per diem relationship with the Employer because they did not work enough hours to maintain their familiarity with any changes that might occur in procedures, teams or policies. McCarthy also stated that when he received the petition in this case, he was surprised because, during the negotiations, the parties had never discussed including per diems in the existing unit. McCarthy further stated that, other than the unit description in the parties' current collective-bargaining agreement that excludes per diems from the unit, he was unaware of any agreement by the Petitioner not to organize any of the Employer's employees who are excluded from the Petitioner's current unit.

2. Analysis of Arguments for Dismissal of the Petition:

a. Permitting a self-determination election during the life of the parties' current collective-bargaining agreement would disturb the parties' existing contractual relationship.

The Employer maintains that since it negotiated the existing contract with the Petitioner on the assumption that per diem employees were not involved in the bargain, for the Board to now require it to allow the per diem employees to choose to be added to the unit, and, therefore, to require the Employer to bargain separately over their terms and conditions of employment for the remaining life of the current contract, would upset the bargain the Employer achieved in the current contract. In this regard, I note that if a bargaining obligation results from the processing of the current petition, so long as the Employer bargains in good faith, it is free either to seek to maintain the status quo with respect to the per diems' terms and conditions of employment, leaving undisturbed the bargain it struck with respect to the remainder of the unit, or to bargain to apply the existing contract's terms to the per diem employees.

The Employer further contends that permitting a self-determination election among its per diem employees at this time would be analogous to permitting an expansion of the existing bargaining unit through accretion, which the Board will not allow during the life of a collective-bargaining agreement specifically dealing with the disputed classification (unless, during bargaining, the petitioning party specifically reserved its right to file such a petition). *Edison* ***[8]*** *Sault Electric Co.* However, as the Board explained in *Edison Sault*, its reason for not permitting clarification during the course of a contract is that to do so would allow **one of the parties** to be able to effect a change in the composition of the bargaining unit during the contract term after it agreed to the unit's definition (emphasis added). *Id.* That situation is, at its core, different from a petition involving a self-determination election, where it is not one of the parties who can effect such a change in the composition of the unit, but rather, the employees themselves, by exercising their right to choose whether or not to be included in the existing unit. Given this essential difference between a unit clarification petition and a self-determination election petition, the Board's reason for not permitting an accretion to an existing unit in the former situation does not apply to the latter situation.

b. The Board should apply contract bar rules to petitions seeking *Armour-Globe* elections, because the terms of any existing collective-bargaining agreement covering the unit involved do not automatically apply to the employees who vote for inclusion in the existing unit.

In *Federal-Mogul Corp.*,[9] the Board held that when a self-determination election results in the addition of a new group of employees to an existing unit already covered by a collective-

bargaining agreement, the employer becomes obligated to engage in good-faith bargaining as to the appropriate contractual terms to be applied to this new addition to the unit, and that this newly added group is not automatically bound to the terms of the existing contract. The Employer maintains that, in view of the Board's rule established in *Federal-Mogul*, permitting a self-determination election in this case would lead to the illogical result that, during the life of the existing contract, the Employer would have two separate bargaining obligations with respect to different employees in the same unit. In this regard, the Employer points to the dissent in *Federal Mogul* by then-Members Kennedy and Penello. They took the position that "the only purpose of the [*Armour-Globe*] election is to determine whether a fringe group of unrepresented employees desires to share in the representation provided by that incumbent union," and, accordingly, the parties have already discharged their duty to bargain, at least with regard to contract provisions that are unitwide in scope and, therefore, apply equally to all unit members. With respect to such provisions, the incumbent union and the employer have already bargained in good faith, have already agreed to specific terms, and have already incorporated those terms into an executed contract covering each and every employee in the unit. In short, with regard to these provisions, the only duty to bargain that remains is with respect to matters not covered by the existing contract that are of unique concern to the newly added employees. Accordingly, then-Members Kennedy and Penello argued that the Board should not entertain petitions or conduct *Armour-Globe* elections unless timely under established contract bar rules with respect to the termination date of existing contracts. In rejecting this argument, the majority in *Federal Mogul* stressed the fact, previously noted by me above, that in bargaining over the terms and conditions of employment of the newly added employees, an employer is free to assert, as a bargaining position, that the existing contract ought to apply to those employees and to invite any suggestions from the union as to what specific modifications should be made to that contract.

c. Undue proliferation of units.

The Employer maintains that if processing the current petition leads to the result that the Employer has two separate bargaining obligations with respect to different employees in the same unit, this violates the Congressional preference for nonproliferation of bargaining units in the healthcare industry because the Employer will be obligated to negotiate a separate contract for per diem employees even though they are part of an existing bargaining unit. Of course, as noted above, this is not entirely accurate, inasmuch as the Employer would be free in bargaining to seek to apply the terms of the existing contract to the per diem employees. Moreover, as the Board has pointed out, the basis for the admonition against unit proliferation was Congress' concern that multiple bargaining units in the healthcare field could lead to increased strikes, jurisdictional disputes, and wage whipsawing that might disrupt the provision of health care. *Catholic Healthcare West d/b/a Mercy Sacramento Hospital*.[10] Here, the addition of the per diem employees to the existing unit, as opposed to placing them in a separate unit, would seem to

comply with the Congressional admonition. Finally, I note that the Board has approved self-determination elections in the healthcare industry. *Evergreen New Hope Health & Rehabilitation Center* [11] (adding RNs to an existing unit of licensed vocational nurses, nurses aides, certified nursing assistants, dietary employees (including cooks), housekeepers, maintenance employees, laundry employees, activity assistants, and janitors).

d. The exclusion of per diem employees in the parties' current collective-bargaining agreement constitutes a waiver by the Petitioner of its right to represent per diem employees as part of the existing unit for the life of that contract.

In support of this contention, the Employer relies on the dissenting opinion of then-Chairman Hurtgen in *Women and Infants Hospital of Rhode Island,* [12] in which he stated that a contractual promise to exclude employees for the life of the contract is a promise not to represent them for the life of the contract, to which he would hold the parties. Then-Chairman Hurtgen noted, however, that his opinion did not (and does not) represent current Board law, and that he was not saying that such precedent should be overruled, but only that the matter be given consideration.

Accordingly, based upon all the foregoing, and consistent with current Board law, the Employer's motion to dismiss the petition is denied.

B. The Appropriate Eligibility Formula

1. Facts:

According to Joshua Sparks, who is currently a full-time unit paramedic who works with per diem employees, the per diem employees fill openings in the Employer's regular schedule, caused by such things as employees being out of work on injury, FMLA leave, and vacation. The per diem employees work 8 hour shifts, sometimes back-to-back for a total of 16 hours, and 12 hour shifts. In addition, he testified that there are a great number of per diem employees who work more than 40 hours per week, although there are also per diem employees who do not work with such regularity. Sparks testified that many of the per diem employees have other jobs as well. [13] During the time that these per diems are working such other jobs, which could involve working a 24 hour shift, they are not available to work for the Employer.

2. Positions of the Parties:

The Employer argues that its per diem employees work extremely irregular hours and that, under such circumstances, the Board will recognize an exception to the 4-hour formula set forth in *Davison-Paxon Co.*[14]

The Union argues that there is no reason to depart from the *Davison-Paxon Co.* formula for eligibility in this case and that, therefore, eligible voters should be those who averaged four or more hours of work in the calendar quarter immediately preceding the issuance of the Decision and Direction of Election.

3. Analysis:

In devising eligibility formulas to fit the conditions of a specific industry, the Board seeks to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer. Although no single eligibility formula must be used in all cases, the *Davison-Paxon Co.* formula is the one most frequently used, absent a showing of special circumstances. *Trump Taj Mahal Casino Resort.*[15] In *Sisters of Mercy Health Corp.*,[16] the Board first applied the *Davison-Paxon Co.*[17] formula to a case involving the healthcare industry. It found there that where the employees in question (on-call nurses) as a group all appear to work on a regular basis, they will be eligible to vote if they regularly average four hours or more of work per week during the calendar quarter prior to the eligibility date.[18] Accord, *S.S. Joachim and Anne Residence*. Contrary to the Employer's assertion, I find that the evidence here indicates that the per diem employees work for the Employer on a regular and recurrent basis. Accordingly, application of the *Davison-Paxon Co.* eligibility formula is appropriate.

C. <u>The Mail Ballot</u>

The parties disagree on whether the election in this matter should be conducted manually or by mail ballot. The mechanics of the election, including the date, time, place of the election, and whether the election should be conducted by mail or manually, is a nonlitigable issue at the hearing. There is no statutory requirement or other rule stating that a regional director's decision on whether or not to conduct an election by mail ballot must be contained in the Decision and Direction of Election.[19] *Odebrecht Contractors of Florida, Inc.* While the parties may have input into the decision, I will determine the mechanics of the election following the issuance of the Decision and Direction of Election.

Accordingly, I find that eligible to vote in the election will be all per diem EMT/

Intermediates and EMT/Paramedics who averaged 4 or more hours of work in the calendar quarter immediately preceding the issuance of the Decision and Direction of Election.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I shall direct an election in the following voting group for this purpose:

> All per diem EMT/Intermediates and EMT/Paramedics employed by the Employer at its Worcester, Massachusetts facility, excluding all other employees, dispatchers, managerial employees, temporary employees, guards, and supervisors as defined in the Act.

If a majority of the valid ballots in the election are cast for the Petitioner, the employees will be deemed to have indicated their desire to be included in the existing unit of full-time and regular part-time EMT/Intermediates and EMT/Paramedics currently represented by the Petitioner, and it may bargain for those employees as part of that unit. If a majority of the valid ballots are cast against representation, the employees will be deemed to have indicated their desire to remain unrepresented, and I will issue a certification of results of election to that effect.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group who were employed during the payroll period ending immediately preceding the date of this Decision who averaged four or more hours of work in the calendar quarter (13 weeks) immediately preceding the issuance of the Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by International Association of EMTs and Paramedics, Local 95, SEIU/NAGE.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*;[20] *NLRB v. Wyman-Gordon Co.*[21] Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. *North Macon Health Care Facility*.[22] In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before September 5, 2006. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must by received by the Board in Washington by September 12, 2006. You may also file the request for review electronically. Further guidance may be found under E-Gov on the National Labor Relations Board web site: www.nlrb.gov.

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Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 29th day of August, 2006.

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[1] The name of the Employer appears as amended at the hearing.

[2] The name of the Petitioner appears as amended at the hearing.

[3] Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[4] At the time of the hearing, there were no EMTs in the unit, which consisted entirely of paramedics.

[5] See, *Globe Machine & Stamping*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942); *Warner-Lambert Co.*, 298 NLRB 993 (1990).

[6] Although at the time of the hearing it appears that full execution of the parties' current collective-bargaining agreement had not yet taken place, the agreement is effective from July 1, 2005 through June 30, 2009.

[7] The negotiations took place during the period from early May 2005to mid-January 2006.

[8] 313 NLRB 753 (1994).

[9] 209 NLRB 343 (1974).

[10] 344 NLRB No. 93 (June 1, 2005).

[11] 371 NLRB No. 71 (May 8, 2002).

[12] 333 NLRB 479 (2001).

[13] Sparks also testified that, as a full-time employee of the Employer, he has other jobs as well.

[14] 185 NLRB 21, 23-24 (1970).

[15] 306 NLRB 294, 296 (1992).

[16] 298 NLRB 483 (1990).

[17] Supra at 24.

[18] 314 NLRB 1191, 1192-1193 (1994). There the Board found that, with some exceptions at either extreme, the vast majority of the employer's RNs worked a substantial number of hours within a relatively narrow range.

[19] 326 NLRB 33 (1998).

[20] 156 NLRB 1236 (1966).

[21] 394 U.S. 759 (1969).

[22] 315 NLRB 359 (1994).